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No. 96-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

NYNEX CORPORATION, NYNEX MATERIEL ENTERPRISES COMPANY, and NEW YORK TELEPHONE COMPANY,

Petitioners,

vs.

DISCON INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Where, in order artificially to inflate the costs incurred by a regulated utility, a non-regulated affiliate of that utility conspires with one of its two suppliers to drive the other, lower cost, supplier out of business:

1. May that conspiracy constitute a *per se* violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?

2. May that conspiracy violate Section 2 of the Sherman Act, 15 U.S.C. § 2?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Discon, Inc., has no corporate parent or subsidiary.

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BRIEF IN OPPOSITION

Respondent, Discon, Inc. ("Discon"), respectfully submits this brief in opposition to the petition for a writ of certiorari.

Counterstatement of the Case

A. Background

This case comes before this Court on the reversal of a judgment dismissing the complaint. The case arose out of the fraud that petitioners perpetrated on the ratepayers of Petitioner NYNEX Corporation's ("NYNEX") wholly owned subsidiary, petitioner New York Telephone Company ("NYTel"), by having one of NYNEX's other wholly owned subsidiaries, petitioner Materiel Enterprises Company ("MECo"), buy goods and services that it resold to NYTel

at prices far above MECo's costs. NYTel recovered these inflated costs from its captive ratepayers. As part and parcel of this scheme, MECo conspired with one of its only two providers of turnkey central telephone office removal services to exclude its other, lower cost supplier, Discon, from the removal market.

The Second Circuit correctly treated this case as an unusual, if not unique, exception to the general rule that, absent an agreement as to price, vertical agreements are not subject to the *per se* rule. Indeed, this case is exceptional because: (a) it arose out of transactions among a regulated utility, its unregulated affiliate and an unaffiliated company; (b) Discon alleged that, as summarized by the Court of Appeals, "the intent and effect of [the combination at issue here] was entirely anti-competitive" (12a); and (c) this allegation was supported by two decisions of the Federal Communications Commission and by a decision of the New York Public Service Commission that the complaint cited, Joint Appendix ("J.A.") 120. The FCC, in a decision to which the Second Circuit referred in its opinion (5a), found, *inter alia*, that: "unreasonable markups and overcharges [were imposed] by MECO on sales of equipment, supplies, and services to NYT[el] and [New England Telephone]; [and] the two regulated telephone companies, in turn, recorded these artificially inflated costs on their regulated books of account, enabling the carriers to recover these costs from ratepayers through the ratemaking process." *In the Matter of New York Telephone Co.*, 5 FCC Rcd. 866 (1990).

In view of these three administrative decisions, the Second Circuit's skepticism as to the ability of "the NYNEX defendants ... to present some pro-competitive justification for choosing a more costly supplier in order to overcharge captive rate-paying customers," (12a) is understated. In

claiming that the decision below set forth "an entirely unsatisfactory and unpredictable rule of law" (Petition for Certiorari ["Pet."] 12) that "will lead to significant litigation and business uncertainty" (Pet. 2) and "lead to a flood of federal antitrust litigation seeking treble damages on behalf of jilted suppliers" (Brief *Amicus Curiae* 5), petitioners and *amicus* conflate business decisions that can at least colorably be claimed to have been taken for legitimate business reasons with the intentionally anti-competitive scheme that gave rise to this lawsuit, a scheme that has been adjudicated to have led to massive inefficiencies and harm to consumers. *See also, Proceeding on Motion of the Commission as to the Rates, Charges, Rules, and Regulations of New York Telephone Company*, 31 NY PSC 485, *aff'd*, 190 A.D. 2d 217, 597 N.Y.S.2d 760 (3d Dept. 1993) (finding that MECo's average charge to NYTel per central office removal, including both those performed by Discon and those performed by Tech, was $98,000, as compared to the $24,595 average cost for comparable removals that NYTel contracted for directly, disallowing $13.85 million from NYTel's then current rates and ordering $20 million per year of future rates to be subject to refund upon subsequent Commission decision).[1]

Thus, in seeking review by this Court, petitioners and *amicus curiae* have vastly overstated the breadth of the

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[1] In a Recommended Decision issued on November 18, 1996 in Case 90-C-0912, *Proceeding on Motion of the Commission to Investigate Transactions Among New York Telephone Company and Its Affiliates*, a New York Public Service Commission Administrative Law Judge recommended that unless, at one last opportunity to do so, NYTel justifies its payments to MECo and other affiliates, it be required to refund approximately $300 million to ratepayers and to reduce rates prospectively by $32 million per annum.

Second Circuit's decision. Although holding in this case that the District Court should decide on remand *whether* to apply a *per se* rule, the Second Circuit made it plain that it was not calling into question its earlier holding in *Oreck Corp.* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (*in banc*), *cert. denied*, 439 U.S. 946 (1978), that, in general, two-firm vertical combinations such as that between MECo and its high price supplier, should be viewed "as exclusive distributorship controversies" (12a) and be governed by the rule of reason.

B. The Complaint

Respondent Discon's complaint alleged, *inter alia*, that the NYNEX companies schemed, as described above, to foist exorbitant telephone rates on NYTel's customers, while funnelling supra-competitive profits to MECo, by having MECo resell to NYTel at markups of as much as 600 per cent the goods and services it purchased for NYTel (J.A. 112, 120-21, 125). As part and parcel of this scheme, the complaint alleged, MECo agreed with AT&T Technologies ("Tech"), a wholly owned subsidiary of AT&T, Inc., that MECo would grant Tech non-competitive contracts for central telephone office removal services in New York State--the specialized business in which Discon engaged--as well as preferential contractual terms, in exchange for which Tech would give MECo secret kickbacks, refrain both from disclosing its prices to NYTel and from contracting directly with NYTel and actively cooperate with MECo in driving Discon from the market (J.A. 112, 121-24).

The complaint alleged further that: (a) from mid-1984 through late 1985, Discon sometimes sold removal services directly to NYTel and sometimes to MECo (J.A. 124-27); (b) in retaliation for the direct sales to NYTel, MECo and

Tech colluded, *inter alia*, to have a former partner of Discon's owner write to NYNEX falsely accusing Discon of malfeasance, including theft on the job, for which accusation the individual was rewarded by being allowed for the first time to subcontract to Tech on removal jobs (J.A. 126-27); and (c) in mid-1986, MECo, acting, in part, on the basis of that defamatory letter, removed Discon from the list of approved vendors, thus barring Discon from selling removal services either to MECo or directly to NYTel (J.A. 127, 129). The complaint alleged that throughout the period from mid-1984 through mid-1986, senior managers of NYTel colluded with the scheme described above, while middle managers sought to hire Discon directly because they knew that its prices for central telephone office removals were very much lower than the grossly inflated prices charged by MECo for work performed by either Discon or Tech (J.A. 129).

The complaint also alleged that NYTel and AT&T were at all relevant times the dominant purchasers of removal services in the New York State area and that MECO and Tech were the dominant suppliers of removal services, with Tech performing all the removals needed by AT&T, as well as, through MECo, the lion's share of those needed by NYTel (J.A. 119-20).

C. The District Court Opinion

Insofar as is relevant here, the District Court dismissed respondent's claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, with prejudice, holding, as to the Section 1 claim, that because MECo had not been alleged to have performed removal services but only to have supplied them to NYTel by purchasing them for

NYTel's ultimate use, MECo had not competed with Discon, and, accordingly, Discon had failed to plead a horizontal conspiracy. The District Court also held that the allegation that Discon had been excluded from the market as part of the scheme on the part of the NYNEX companies and Tech to pass unwarranted costs onto NYTel's ratepayers through the ordinary process of cost-plus ratemaking failed to allege a conspiracy "to force [a seller] to comply with fixed prices." (30a) Finally, the District Court held that Discon had not pled "specific facts that rule out the possibility that NYNEX acted unilaterally in choosing [Tech] over Discon." (31a)

As to Discon's Section 2 claims, the District Court held, *inter alia*: (a) that because none of the NYNEX companies participated in the same market as Discon, they could neither monopolize nor attempt to monopolize that market; and (b) that Discon had failed adequately to plead a conspiracy to monopolize inasmuch as it had failed either to specify any concerted action on the part of Tech and MECo or to allege a specific intent to monopolize (37a).

D. The Decision of the Court of Appeals

Insofar as is relevant here, the Court of Appeals affirmed the District Court's dismissal of Discon's claims of price fixing, monopolization and attempt to monopolize but reversed as to Discon's claims of conspiracy to restrain trade and conspiracy to monopolize. The Court of Appeals viewed MECo as analogous to an in-house purchasing division of NYTel and, held, accordingly, that Discon had not pled a horizontal conspiracy. However, taking note of the FCC investigation of the scheme described above--which proceeding was settled, *inter alia*, by NYTel and New England Telephone agreeing to reduce their capital account

balances (on which they recovered depreciation costs from ratepayers) by $32.6 million, reduce their interstate revenue requirements by $35.5 million and make a "voluntary payment" of $709,500 each to the United States Treasury, *In re New York Telephone Co.*, 5 FCC Rcd. 5892 (1990), cited at 5a[2]--the court held that Discon's allegations of a conspiracy between MECo and Tech stated a Section 1 claim under the rule of reason, and that, although the conspiracy alleged was a vertical one, the allegations

> possibly [stated a claim] under the *per se* rule applied to group boycotts in *Klor's*, if the restraint of trade "has no purpose except stifling competition." *Oreck*, 579 F.2d at 131 (quoting *White Motor Co.* v. *United States*, 372 U.S. 253, 263 (1963)).

(13a).[3]

However, while noting that "the traditional rationale for applying the rule of reason to two-firm boycotts--the promotion of interbrand competition over intrabrand

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[2] The scale of the NYNEX companies' scheme is not immediately evident from these figures. The amount of MECo overcharges was in fact found to be $118.5 million, of which $80.6 million was charged by MECo for capital items, the cost of which could be recovered only as depreciation expenses. The reduction in capital balances together with the refund were calculated to make NYNEX's ratepayers whole for the excess amounts they had paid for interstate calls alone. *See, In the Matter of New York Telephone Co.*, 5 FCC Rcd. 866, 873 n. 27 (1990). The Court had also been referred to the New York Public Service Commission proceeding described above (J.A. 120-21).

[3] The Questions Presented by the Petition do not challenge the court's holding that Discon is entitled to a trial under the rule of reason.

competition--does not exist in this case," the Court of Appeals explicitly specified that it was "not decid[ing] at this point *whether* the District Court on remand should apply a *per se* rule" (13a n. 6) (*emphasis supplied*).

With regard to Section 2 of the Sherman Act, the Court of Appeals affirmed the dismissal of Discon's claims of monopolization and attempted monopolization on the basis of the court's conclusion that Discon had failed to allege that MECo competed with Discon in the same market. However, the Court of Appeals reversed the District Court's dismissal of the claim for conspiracy to monopolize, holding: (a) that Discon had sufficiently alleged that Tech competed with Discon and that the NYNEX companies had conspired with Tech and had performed overt acts intending to assist Tech in its monopolization of the market for removal services; and (b) that the requirement of specific intent was met by Discon's allegations that "MECo sought the dominance of [Tech] in order to ensure the suppression of other suppliers who would bypass MECo and deal with NYTel directly" (15a).

Petitioners' petition for rehearing and rehearing *in banc* was denied, with no judge requesting that a vote be taken on the suggestion for rehearing *in banc* (55a).

REASONS FOR DENYING THE WRIT

A. The Decision of the Court of Appeals Upholding Discon's Section 1 Claim Conflicts Neither with This Court's Decision in *Sharp* nor with Any Decision of a Court of Appeals and Is Consistent with This Court's Teachings on Applying the *Per Se* Rule

i. The Decision Below Does Not Conflict with *Sharp*.

In *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988), this Court held that because it was not shown in that case that an agreement between a manufacturer and a dealer to terminate another, "price cutter" dealer "without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition and reduce output," *Sharp*, at 726-27, that agreement should be examined under the rule of reason rather than under the *per se* rule. That holding was squarely based on this Court's longstanding economic analysis showing that: (a) a vertical intrabrand restraint may well stimulate interbrand competition by, *inter alia*, eliminating the problem of freeloading dealers; and (b) "*so long as interbrand competition existed*, that would provide a 'significant check' on any attempt to exploit intrabrand market power." *Sharp* at 725, quoting *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 52, n. 19 (1977) (*emphasis supplied*).

In decisive contrast to the instant case, neither *Sharp* nor *GTE Sylvania* (nor *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984)), nor any of the decisions of Courts of Appeal cited by petitioners in support of their § 1 argument) involved a vertical agreement between parties, where even one of those parties had market power. Indeed, the analysis in *Sharp* is explicitly predicated on the presence of interbrand competition, *Sharp* at 725, *i.e.*, the ability of consumers to substitute a different brand of the same product, *Sylvania* at 53 n. 19. Here, however, NYTel had, as it still has, a monopoly over its product, and Tech and MECo were alleged to have acted in concert to eliminate any competition in supplying removal services to NYTel. The

complaint alleged (J.A. 119-21) that NYTel and AT&T were the dominant consumers of removal services in the New York State area, that Tech performed all the removal work required by AT&T as well as most of that required by NYTel, and that Tech and the NYNEX companies sought to ensure that MECo would be not only, as it already was, the only purchaser of removal services for resale to NYTel but also the only direct seller of removal services to NYTel. Thus, the alleged agreement between MECo and Tech to bar Discon from the removal market sought to exclude, and did exclude, the company that alone competed with Tech to perform removals for NYTel and alone challenged the NYNEX companies' scheme to make MECo the sole seller of removal (and other) services to NYTel.[4] Accordingly, *Sharp* is not directly applicable to this case, and thus, contrary to petitioners' main argument, the decision of the Court of Appeals does not conflict with *Sharp*.

[4] Petitioners argue that Discon's complaint "alluded to several pro-competitive reasons for not dealing with Discon" (Pet. 13). Petitioners claim that these "reasons" "included" that Discon had made a loan that it did not expect to be repaid to Robert W. Zirkelbach, a MECo employee, and that "questions were raised about the honesty, quality and safety of Discon's work." Petitioners add that "[n]aturally, Discon's pleading did not admit that these reasons were valid" (Pet 13 n. 5). What Discon's complaint alleged with regard to these "reasons" is that the first was a falsehood that petitioners tried unsuccessfully to extort from Discon's owner in their attempt to frame Mr. Zirkelbach (J.A. 127-28) and that the second was a deliberate and orchestrated attempt by MECo and Tech to defame Discon immediately after a middle manager at NYTel had greatly increased the scope of a removal job for which Discon and NYtel had negotiated the price directly. *See* J.A. 126-27. To label as competitively motivated acts that were alleged to have been ploys in a scheme to eliminate competition is truly Orwellian Newspeak.

ii. The Decision Below Is Consistent with This Court's Teachings on Applying the *Per Se* Rule

In *Sharp*, this Court summarized its teachings on applying *per se* rules as follows:

> We have said that *per se* rules are appropriate only for "conduct that is manifestly anticompetitive," *id.*, at 50, that is, conduct "'that would always or almost always tend to restrict competition and decrease output,'" *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-290 (1985), quoting *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979).

Sharp, at 723.

That eliminating all competition in supplying a regulated monopolist such as petitioner NYTel "almost always tends," *Sharp* at 726, to generate inefficiencies that harm consumers is clear from the history of the Bell Telephone companies when they were owned by AT&T and there was no actual competition to be eliminated, *i.e.*, prior to the divestiture of AT&T in 1984. *See, United States* v. *AT&T*, 552 F. Supp. 131, 163 (D.D.C. 1982) (local operating companies forced to buy from their non-regulated affiliate, Western Electric, "even though other manufacturers produced better products or products of identical quality at lower prices."); *See also, AT&T Co.* v. *United States*, 299 U.S. 232, 246 (1936) (upholding FCC requirement of just and reasonable rates and referring to "intercorporate relations that are matters of common knowledge"); *Lindheimer* v.

Illinois Bell Tel. Co., 292 U.S. 151, 165 (1934) (rate reduction justified by overcharges imposed by unregulated affiliate). As Areeda and Turner state:

> since the probabilities of significant adverse economic effects attending monopolization of an unregulated supply stage by a regulated monopoly seem peculiarly high, we would make it presumptively illegal.

P. Areeda and D. Turner, *Antitrust Law* ¶ 726.

It is difficult to imagine conduct more "manifestly anticompetitive" and more purposefully designed to contravene the Sherman Act's purpose of promoting "consumer welfare," *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 107 (*cites omitted*) (1984), than that alleged in Discon's complaint. The attempt, successful in this case, to eliminate competition so as to allow the unfettered passthrough of inflated costs to NYTel's ratepayers, with MECo and Tech sharing the resulting supra-market profits, was nothing short of an attempt to recreate the pre-divestiture relationship between the Bell Telephone companies and Western Electric, *i.e.*, the functional equivalent of precisely that "monopolization of an unregulated supply stage by a regulated monopoly" that Areeda and Turner would make presumptively illegal.

In view of the allegations of the complaint that petitioners' scheme was undertaken in order to create inefficiencies (J.A. 120) and the FCC and New York Public Service Commission decisions cited in the complaint, which found that, all too foreseeably, the scheme had succeeded on a spectacular scale, the holding of the Court of Appeals that the trial judge should decide whether to apply a *per se* rule

not only does not conflict with *Sharp* but is entirely consistent with the pro-competitive principles that *Sharp* articulated to govern the application of *per se* rules.

iii. The Decision Below Does Not Conflict with the Holdings of Other Courts of Appeal

None of the nine Courts of Appeal decisions that petitioners claim to be in conflict with the decision of the Second Circuit (Pet. 10 n. 4) held that a *per se* rule may not apply to a non-price-fixing vertical agreement. Although each of those courts refused to apply a *per se* rule to the situation before it, those situations differed markedly from that presented here. Indeed, of the nine, three affirmed a grant of summary judgment to defendants on the ground that plaintiffs had failed to prove any agreement at all, *Bailey's, Inc.* v. *Windsor America, Inc.*, 948 F.2d 1018, 1030-31 (6th Cir. 1991); *Terry's Floor Fashions, Inc.* v. *Burlington Industries, Inc.*, 763 F.2d 604, 611 (4th Cir. 1985); *Products Liability Insurance Agency, Inc.* v. *Crum & Forster Insurance Companies*, 682 F.2d 660, 662 (7th Cir. 1982); one affirmed the grant of summary judgment to defendant on the ground that the only agreement shown was an intracorporate agreement, *Ark Dental Supply Co., Inc.* v. *Cavitron Corp.*, 461 F.2d 1093, 94 n.1 (3d Cir. 1972); one reversed judgment for plaintiff on the ground that implementation of the vertical agreement that was proved "did not deprive plaintiff of an element necessary to compete," *Gough* v. *Rossmoor Corp.* 585 F.2d 381, 387 (9th Cir. 1978); one reversed judgment for plaintiff on the ground that plaintiff had failed to prove either an agreement or exclusionary or coercive conduct, *E.A. McQuade Tours, Inc.* v. *Consolidated Air Tour Manual Comm.*, 467 F.2d 178, 187 (5th Cir. 1972), *cert. denied*, 409 U.S. 1109 (1973); one was explicitly predicated on the presence of interbrand

competition, *Westman Commission Co.* v. *Hobart Int'l, Inc.*, 796 F.2d 1216, 1225 (10th Cir. 1986), *cert. denied*, 486 U.S. 1005 (1988); one reversed judgment for plaintiff because the vertical arrangement that was proved at trial supported a *per se* claim of tying but the trial had been litigated exclusively on a horizontal conspiracy theory, *Construction Aggregate Transp., Inc.* v. *Florida Rock Industries, Inc.*, 710 F.2d 752 (11th Cir. 1983) (reversing judgment for plaintiff and remanding for new trial); and one affirmed a grant of summary judgment to defendant because plaintiff had failed to show that dealer-inspired refusals to deal had "any predominantly anticompetitive effects...as a class," *Lomar Wholesale Grocery, Inc.* v. *Dieter's Gourmet Foods, Inc.*, 824 F.2d 582, 594 (8th Cir. 1987).

Not one of these decisions intimated, much less held, that a vertical agreement between two companies, each of which has dominant market power and both of which have a regulated monopolist as their ultimate customer, to eliminate all competition to both of them may not constitute a *per se* violation of Section 1. Thus, not one of these cases conflicts with the holding below.

B. The Decision Below Upholding Discon's Conspiracy To Monopolize Claim Does Not Conflict with *Sharp* or with Any Court of Appeals Decision.

Petitioners' argument that the Court of Appeals erred in holding that Discon's complaint states a claim for conspiracy to monopolize rests solely on their mischaracterization of the complaint. Discon did not allege, as petitioners would have it, that a buyer (MECo) agreed to use one supplier (Tech), instead of another (Discon) (Pet. 14-16), but, rather, that MECo and Tech actively colluded to bar Discon from selling its services to NYTel. Among the

collusive acts alleged was that, immediately after NYTel had greatly expanded a job for which it had negotiated the price directly with Discon, MECo and Tech arranged to have a letter defaming Discon sent to NYNEX (J.A. 126-27). MECo subsequently used this letter as a basis to decertify Discon as a vendor either to MECo or to NYTel (J.A. 127), and Tech rewarded the writer of the letter by for the first time allowing him to subcontract to Tech on removal jobs (J.A. 127). Had MECo (or NYNEX) simply chosen unilaterally, or even by prior agreement with Tech, to buy removal services for NYTel from Tech rather than from Discon, there would have been no need for this defamatory letter.

Petitioners also err in claiming that the Court of Appeals holding is based on "a theory not pleaded by Discon" (Pet. 14). Contrary to petitioners' claim, the complaint alleged, *inter alia*, that Tech was the exclusive supplier of removal services to AT&T and that, "[a]cting in concert with MECo, [Tech] has perpetuated its monopoly over the supply of removal services to [NYTel]" (J.A. 119).

C. The Decision of the Court of Appeals Is Correct for an Independent Reason

Discon argued below that it was the victim of a horizontal conspiracy on the part of MECo and Tech to exclude it from the removal market. Although the Court of Appeals acknowledged that whenever NYTel contracted directly with Discon, MECo "presumably would lose the opportunity to derive a commission [and that [t]herefore, in one sense, MECo could be considered, if not a supplier, at least a competitor with Discon and [Tech]" (9a), the Court "decline[d] to adopt this line of analysis for two reasons"

(*Id.*). These reasons were: (a) that MECo "by its very nature" sold removal services only to NYTel; and (b) that MECo and NYTel were affiliated (*Id.*). The Court of Appeals reasoned, on this basis, that had MECo been organized "as a purchasing department within NYTel, rather than as a separate corporate entity, it would be undisputed that MECo did not compete with Discon or [Tech]. We *believe*," the Court concluded, that "it would be incongruous to apply a different rule simply because MECo holds its own corporate charter. *Cf., Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 58-59 (1977) (courts in antitrust cases should eschew 'formalistic line drawing'" (*9a-10a*, emphasis supplied).

But MECo's separate corporate existence was far from a formalistic matter for NYNEX--or for Discon. The whole scheme, described above, of passing supra-market costs through to NYTel's ratepayers depended on MECo being incorporated separately from NYTel. Had MECo been a "purchasing department within NYTel," its costs would from the start have been scrutinized in NYTel rate cases, there would have been neither exorbitant markups on services bought nor secret rebates from Tech, and MECo would have had no reason to prefer to buy from higher cost Tech than from lower cost Discon. In short, Discon would have thrived rather than having been made to wither. Inasmuch as the antitrust laws deal with real world economic purposes and consequences, it cannot be ignored that the separate corporate existence of MECo was the linchpin of the scheme addressed by the FCC and New York PSC proceedings discussed above and that, but for the scheme made possible by MECo's separate corporate existence, petitioners would have had no reason to exclude Discon as a supplier of removal services.

Moreover, for the FCC the separate corporate existence of MECo and NYTel entailed obligations the breach of which was sanctionable. *See, In the Matter of New York Telephone Co.*, 5 FCC Rcd. 866, 869 (1988) ("NYNEX ... effectively established the regulated telephone companies [NYTel and New England Tel. Co.] as captive customers of MECo.")

Once MECo is seen to stand apart from NYTel, it is evident that both MECo and Tech competed with Discon in selling removal services to NYTel. That Tech collusively chose not to deal directly with NYTel but only to sell its services through MECo is irrelevant. Those, like Tech, who can readily shift into offering an alternative source for a product are in the same market as those already providing the product. Areeda & Turner, *supra*, ¶ 530. Nothing, other than its own collusion in petitioners' scheme, prevented Tech from bidding directly to NYTel. That MECo was not alleged to have performed removal services on its own is equally irrelevant. As the Court of Appeals recognized, MECo competed with Discon for "commissions," *i.e.*, it competed to be paid for providing removal work. MECo competed with Discon just as surely as Discon would still have competed (with MECo and Tech) had it subcontracted the physical labor of removals to a third party instead of performing the work itself. Accordingly, although the Court of Appeals declined to follow this analysis, Discon properly alleged a horizontal conspiracy on the part of MECo and Tech to exclude it from the removal market. On this basis, too, this Court should deny the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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